

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FELIX BRIZUELA,

Plaintiff,

v.

CIVIL NO. 1:22-CV-76
(KLEEH)

HIGHLANDS HOSPITAL and
MICHELLE CUNNINGHAM,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION [ECF NO. 18] IN PART
AND DISMISSING ACTION WITH PREJUDICE

On August 24, 2022, the pro se Plaintiff, Felix Brizuela, filed a Complaint against the Defendants, Highlands Hospital and Michelle Cunningham. Pursuant to 28 U.S.C. § 636 and the local rules, the Court referred the action to United States Magistrate Judge Michael J. Aloï (the "Magistrate Judge") for initial review. On September 20, 2022, the Magistrate Judge entered a Report and Recommendation ("R&R"), recommending that the Court dismiss the action without prejudice for failure to state a claim [ECF No. 7]. Plaintiff filed two sets of objections to the R&R [ECF Nos. 9, 11]. He then filed an Amended Complaint on October 13, 2022 [ECF No. 13]. Defendants filed a motion to dismiss on November 3, 2022 [ECF No. 14], to which Plaintiff filed a Response [ECF No. 16]. The Magistrate Judge held the motion to dismiss in abeyance [ECF No. 17]. On December 12, 2022, the Magistrate Judge entered a

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second R&R, recommending that the Amended Complaint be dismissed without prejudice for failure to state a claim [ECF No. 18].

The second R&R informed the parties that they had fourteen (14) days from the date of service of the R&R to file "specific written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection." It further warned them that the "[f]ailure to timely file written objections . . . shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals." Plaintiff accepted service of the second R&R on December 15, 2023. To date, no objections have been filed.

When reviewing a magistrate judge's R&R, the Court must review de novo only the portions to which an objection has been timely made. 28 U.S.C. § 636(b)(1)(C). Otherwise, "the Court may adopt, without explanation, any of the magistrate judge's recommendations" to which there are no objections. Dellarciro v. Gutierrez, 479 F. Supp. 2d 600, 603-04 (N.D.W. Va. 2007) (citing Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983)). Courts will uphold portions of a recommendation to which no objection has been made unless they are clearly erroneous. See Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005).

Because no objections were filed, the Court is under no

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obligation to conduct a de novo review. Accordingly, the R&R was reviewed for clear error. Upon careful review, and finding no clear error, the Court **ADOPTS IN PART** the second R&R [ECF No. 18]. Rather than dismissing without prejudice as recommended, the Court finds that the action shall be **DISMISSED WITH PREJUDICE** and **STRICKEN** from the Court's active docket. The motion to proceed in forma pauperis is **DENIED** [ECF No. 2]. The first R&R and the motion to dismiss are **DENIED AS MOOT** [ECF No. 7, 14].

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to counsel of record via email and the pro se Plaintiff via certified mail, return receipt requested.

DATED: June 13, 2023



THOMAS S. KLEE, CHIEF JUDGE
NORTHERN DISTRICT OF WEST VIRGINIA